ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on	)	
Universal Service	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

As a provider of commercial mobile radio ("CMRS") service with an essentially nationwide footprint, Nextel Communications, Inc. ("Nextel") is well-positioned to contribute directly to the achievement of Congress' universal service goal to make telecommunications services and advanced services available to the American public, regardless of geographic location and economic status. The Federal Communications Commission's (the "Commission") universal service rules, however, must not unduly or unlawfully burden wireless carriers with financial obligations that will inhibit their ability to compete for universal service contracts, or that will inadvertently deprive them of their eligibility for universal service support. Accordingly, Nextel urges the Commission to adopt rules that: (1) are consistent with federal/state jurisdictional limitations; (2) promote consumer choice; and (3) do not provide for a unmanageably large fund subject to undetectable abuse.

In its recommendations to the Commission, the Joint Board concludes that CMRS providers should contribute to state universal service support mechanisms. Section 332(c)(3), however, specifically exempts CMRS providers from state universal service obligations when they do not provide "the only means of obtaining basic telephone service within a state." Accordingly, the Commission must make plain that CMRS providers need not contribute to state universal service mechanisms unless the lack of competition in the provision of basic telephone service within a particular state so dictates.

Similarly, the Commission should not base the calculation of universal service contributions on a telecommunications carrier's interstate and intrastate revenues. Pursuant to jurisdictional separations between state and federal regulatory authority, the Commission is

unable to base federal universal service contributions on the interstate *and* intrastate revenues of telecommunications carriers. Indeed, the Commission is expressly barred from calculating universal service contributions in the proposed manner by the express mandate of Congress.

In establishing eligibility standards for universal support, the Commission's rules must ensure that the definition of "service area," as applied in Section 214(e), does not inadvertently exclude wireless carriers from participating in the federal universal service fund. The Commission should define the service area to mean the contiguous portions of a rural telephone company's cost study area or the area in which the service provider is seeking to serve customers, *e.g.* the telephone franchise area or a wireless company's service area.

Finally, the Commission's competitive bidding rules should clarify that the bidding procedure does not mandate that schools, libraries and health care providers only choose the service offerings of the entity that has submitted the lowest bid. In addition, to prevent the leveraging of core services in competing for the opportunity to provide advanced services, and to prevent LECs and other entities from submitting "all-or-nothing" bids, the Commission should require that parties submitting bundled bids separately identify the costs of the core telecommunications services and the advanced services in the bid submission. Expressly identifying the different costs of the services offered will enable schools, libraries and health care providers to make reasoned consumer choices and will permit wireless providers to compete for advanced services contracts.

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NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits it comments in response to the Federal-State Joint Board's universal service recommendations made to the Federal Communications Commission (the "Commission") on November 7, 1996,[1/] and the Public Notice released by the Commission on November 18, 1996.[2/]

I. Introduction

As a provider of commercial mobile radio ("CMRS") service with a nationwide footprint, Nextel is well-positioned to further the achievement of Congress' goal to make telecommunications services and advanced services universally available to the American public, regardless of geographic location and economic status. In many circumstances, wireless service providers offer the only cost-efficient alternative for the delivery of communications

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1/ *See Recommended Decision*, Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (rel. November 8, 1996) ("*Recommended Decision*").

2/ *See Public Notice*, "Common Carrier Bureau Seeks Comment on Universal Service Recommended Decision," DA 96-1891 (rel. November 18, 1996); *see also Order*, CC Docket No. 96-45 (rel. December 11, 1996) (establishing new comment date of December 19, 1996).

services in rural and high cost regions of the country. Indeed, with the development of wireless local loop capabilities and the increased competitive pricing of wireless service offerings, CMRS is quickly becoming a preferred choice among many Americans seeking to satisfy their need for affordable, ubiquitous and dependable communications services.[3/]

Significant contributions of wireless providers, however, can only be made if the Commission's rules encourage their participation. Nextel, therefore, commends the Joint Board on its efforts to establish a competitively neutral federal universal service support system that makes support mechanisms available to wireless service providers.[4/] However, the Commission's rules must not unduly or unlawfully burden wireless carriers with financial obligations that will inhibit their ability to compete for universal service contracts, or that will inadvertently deprive them of their eligibility for universal service support. Accordingly, Nextel urges the Commission to adopt rules that: (1) are consistent with federal/state jurisdictional limitations; (2) promote consumer choice; and (3) do not provide for a unmanageably large or economically inefficient fund.

3/ The increasing use of wireless local area networks, wireless PBX services and developing wireless Internet access capabilities attests to the extent to which wireless carriers can address the varied telecommunications needs of both individuals and businesses. Moreover, increasingly secure data transmission capabilities will allow wireless carriers to address the advanced services needs of schools, libraries and health care providers pursuant to Section 254(h) of the Telecommunications Act. *See* 47 U.S.C. § 254(h).

4/ *See Recommended Decision* at ¶ 23 (providing that "[u]niversal service support mechanisms and rules should be applied in a competitively neutral manner").

II. The Commission Must Acknowledge that CMRS Providers are Exempt from Contribution Requirements Imposed by State Universal Service Regulations.

In its recommendations to the Commission, the Joint Board concludes that CMRS providers should contribute to state universal service support mechanisms.[5/] Section 332(c)(3), however, specifically exempts CMRS providers from state universal service obligations when they do not provide "the only means of obtaining basic telephone service within a state."[6/] Accordingly, the Commission must make plain that CMRS providers need not contribute to state universal service mechanisms unless the lack of competition in the provision of basic telephone service within a particular state so dictates.

A. Section 332(c)(3)

Section 332(c)(3) of the 1993 Budget Act expressly provides that "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[7/] Moreover, the second clause of Section 332(c)(3) imposes the following limiting condition on the general clause:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for landline telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[8/]

5/ *See Recommended Decision* at ¶ 791 ("we find that section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state universal support mechanisms . . . .").

6/ *See* 47 U.S.C. § 332(c)(3).

7/ *Id.*

8/ *Id.* (emphasis provided).

In so amending the Communications Act in 1993, Congress preempted state and entry regulation to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[9/] In addition, Congress expressly directed that state universal service mechanisms could only be applied to CMRS "where such services are a substitute for landline telephone exchange service for a substantial portion of the communications within such State."

The legislative history clarifies any ambiguity as to when a commercial mobile radio service is a "substitute for landline telephone exchange service for a substantial portion of the communications within a state." Specifically, the legislative history states:

> the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service *if subscribers have no alternative means of obtaining basic telephone service*. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services . . . .

Accordingly, a commercial mobile radio service is not a substitute for landline telephone exchange service for a substantial portion of the communications within a state unless it is the only "means of obtaining basic telephone service" within the state. CMRS providers, therefore, can be subject to contributions to state universal service support systems under Section 332(c)(3) only under very limited circumstances, *e.g.* if there are no alternative means of obtaining basic telephone service to subscribers within a state. The Commission's rule must recognize this

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9/ *See* H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993); *see also* H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (stating that the intent of Section 332 (c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services").

important limitation on state and concomitantly federal authority to require CMRS providers to contribute to universal service programs.

B. Section 254

The relevant portions of Section 254 of the Telecommunications Act define the nature and scope of universal service obligations that apply to carriers that provide interstate telecommunication services. Section 254(b)(4) establishes, as a general principle, that:

> [a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

In addition, Sections 254(d) and (f) impose specific duties on telecommunications carriers to contribute to state and federal universal service funding mechanisms to the extent they provide interstate and intrastate services. These sections expressly provide that "[e]very telecommunications carrier" shall contribute "on an equitable and nondiscriminatory basis" to Commission-established universal service funding mechanisms, with respect to interstate services, and State-established universal service mechanisms "consistent with" Commission rules, with respect to intrastate services.[10/]

Section 332(c)(3)'s exemption of all CMRS providers that do not provide a substitute for landline local exchange service for a substantial portion of the state from universal service obligations is consistent with Section 254's imposition of universal service obligations on "[e]very telecommunications carrier." Specifically, Section 332(c)(3)'s exemption of certain classes of CMRS providers from universal service obligations is a general *interpretive* provision by which Congress established its own rule of statutory construction to govern subsequent

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10/ *See* 47 U.S.C. § 254(d) and (f).

legislative enactments concerning universal service. Congress, therefore, has addressed directly the question of how CMRS providers are to be treated under the Communications Act with respect to universal service obligations by enacting Section 332(c)(3). The general language of Section 254 is subordinate to and must be interpreted in light of the more specific pronouncement.

Similarly, the Supreme Court in *Louisiana PSC* ruled that the reservation of state regulatory authority under Section 2(b) of the 1934 Act:

> provides its own rule of statutory construction. In other words, the Act itself, in [Section 2(b)], presents its own specific instructions regarding the correct approach to the statute which applies to how [a court] should read [related and subsequently enacted statutory provisions].[11/]

Just as Section 2(b) provides its own specific instructions regarding the correct approach to the statute, Section 332(c)(3)'s state universal service exemption for CMRS governs subsequent pronouncements regarding universal service. Accordingly, there is no inconsistency between the universal service provisions of Sections 332(c)(3) and 254 that would justify a finding that Congress intended Section 254 to repeal by implication Section 332(c)(3)'s exemption of CMRS from contributing to state universal service programs.

11/ *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 378, n.5, 106 S. Ct. 1890, 1903 (1986) ("*Louisiana PSC*").

III. The Commission Should Not Base The Calculation of Universal Service Contributions on a Telecommunications Carrier's Interstate and Intrastate Revenues.

The Joint Board, without explanation, recommends that the Commission fund the provision of universal service to schools, libraries and health care providers through contributions of telecommunications carriers based on their interstate and intrastate revenues. Moreover, it suggests a similar approach to funding federal universal service mechanisms made available generally to other eligibles, though it reserves final judgment on the matter until after further industry comment.[12/]

Based on jurisdictional limitations inherent in state and federal authority, the Commission cannot premise federal universal service contributions on the interstate *and* intrastate revenues of telecommunications carriers. Indeed, the Commission is expressly barred from calculating universal service contributions in the proposed manner by the express mandate of Congress. Section 2(a) of the Communications Act expressly provides that:

> [t]he provisions of this act shall apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, ...[13/]

12/ *See Recommended Decision* at ¶ 817.

13/ *See* 47 U.S.C. § 152(a).

Accordingly, the Commission can only base the funding of the federal universal service programs on revenues or costs subject to its regulatory jurisdiction.[14/] Indeed, the obligation to separate the jurisdictional spheres is constitutional in dimension.[15/]

Finally, given the detrimental effect the Joint Board's determination will have on state universal service programs, through the "double" taxation of intrastate revenues, it is unlikely that Congress intended this interpretation of Section 254. Moreover, the reciprocal possibility that state universal service programs could be funded according to a carrier's interstate and intrastate revenues is equally untenable.[16/] Many carriers, including new entrants, simply cannot bear the burden of such a tax. With such far-reaching effects, Congress would not have altered established jurisdictional separations in Section 254 without making its intention explicit.

14/ *See Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930) ("The separations of the intrastate and interstate property, revenues and expenses of the company is important not simply as a threshold allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.").

15/ *See e.g. Brookings Municipal Telephone Company v.* FCC, 822 F.2d 1153, 1155 (D.C. Cir. 1987) (recognizing that apportionment between Commission and states is "not of mere academic or internal bookkeeping interest," but must be performed based on distinct jurisdictional limitations imposed on the Commission and the states); *see also AT&T v. The Public Service Commission of Wyoming*, 625 F. Supp. 1204, 1207-08 (1985) (determining that Public Service Commission's requirement that AT&T file a tariff based on "total billings," which included interstate calls, was in violation of federal law). The "mutual goal" shared by the states and the federal government on universal service objectives does not provide a basis upon which the Commission obtains jurisdiction over intrastate telecommunications activities and revenues. *See Recommended Decision* at ¶ 818. Similarly, the "continued partnership among the states and the FCC in preserving and advancing universal services" does not permit the Commission to disregard its jurisdictional limitations and exert regulatory authority over revenues earned from intrastate activities. *See Recommended Decision* at ¶ 819.

16/ *See Recommended Decision* at ¶ 822.

IV. The Commission Must Adopt a Service Area Definition That is Competitively Neutral and Permits The Participation of New Carriers.

Section 254(e) of the Communications Act, as amended, provides that, after the effective date of the Commission's regulations implementing Section 254, "only an eligible telecommunications carrier designated under Section 214(e) shall be eligible to receive specific Federal universal service support."[17/] Moreover, the Joint Board explicitly recommends that the Commission provide that any telecommunications carrier that meets the eligibility criteria of Section 214(e)(1) (*e.g.* offers and advertises universal services throughout the "service area") should be eligible for universal service support.[18/]

If this recommendation is adopted by the Commission, and eligibility for universal service is so established, the Commission's rules must ensure that the definition of "service area," as applied in Section 214(e), does not exclude wireless carriers from participating in the federal universal service fund. For instance, in areas where rural telephone companies provide service, the Joint Board recommends that the relevant service area for determining universal service support be defined as the current study area for the incumbent rural telephone company.[19/] This proposal, however, fails to recognize that the study areas of many rural telephone companies are non-contiguous and many cover widely separated geographic areas. Consequently, adoption of this definition could create considerable barriers to a wireless provider's ability to qualify for universal service support.

17/ *See* 47 U.S.C. § 254(e).

18/ *See Recommended Decision* at ¶ 155.

19/ *See Recommended Decision* at ¶ 167.

Using the rural telephone companies' current study area as the threshold for determining universal service eligibility will exclude many newly-established and emerging service providers, as well as existing wireless service providers, from participating in the provision of universal service. Some wireless carriers are licensed within a prescribed geographic region with limited boundaries; others are licensed on a station-by-station basis. Similarly, emerging competitive local exchange carriers ("CLECs") and competitive access providers ("CAPs") are financially and practically limited to providing service in distinct regions. Mandating that these companies serve larger, and potentially dispersed areas, will ensure that only incumbent LECs can obtain the benefits of federal universal service mechanisms.

The Joint Board already has recognized the detrimental effects of establishing an overly-broad service area definition by recommending that the states, in cooperation with the Commission, establish relatively small service area definitions in areas not served by rural telephone companies.[20/] As stated by the Joint Board:

> [a]n unreasonably large area may deter entry because fewer competitors may be able to cover start-up costs that increase as the size of the area they must serve increases. This would be especially true if the states adopt as the service area the existing study areas of larger local exchange companies, such as the BOCs, which usually include most of the geographic area of a state, urban as well as rural.[21/]

The Commission, therefore, based on its express authority to do so,[22/] should define the service area to mean the contiguous portions of a rural telephone company's cost study area or the area

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20/ *See Recommended Decision* at ¶ 176.

21/ *Id.*

22/ *See* 47 U.S.C. § 214(e)(5) (providing that the relevant service area is the rural telephone company's study "unless and until the Commission and the states . . . establish a different service area for [the] company.").

in which the service provider is seeking to serve customers, *e.g.* the telephone franchise area or a wireless company's service area. This definition will satisfy Congress' goal of promoting competition and establishing a competitively neutral federal universal service support system. It also is consistent with the Joint Board's recommended service area definition for determining carrier eligibility to receive universal service support when providing advanced services to schools, libraries and health care providers.[23/]

V. The Commission Must Refine the Joint Board's Competitive Bidding Recommendations To Ensure that Schools, Libraries and Health Care Providers Are Afforded Flexibility in their Choice of Services and Service Providers.

The Joint Board correctly concludes that providers of advanced services to schools, libraries and health care providers need not also provide "core" services to be eligible for universal service support under Section 254 of the Telecommunications Act.[24/] The Commission, however, must confirm that the implementation of Congress' universal service directive must offer a meaningful opportunity to participate solely as a provider of advanced services. Specifically, the Commission's competitive bidding rules should clarify that the bidding procedure does not mandate that schools, libraries and health care providers only choose the service offerings of the entity that has submitted the lowest bid.

23/ *See generally Recommended Decision* at ¶ 543 (recognizing that "using an expansive definition of geographic area might be unfair to a small telephone company serving a single community . . . for such a definition would permit it to be compelled to serve other schools outside its geographic market.").

24/ *See Recommended Decision* at ¶ 543. Indeed, the Telecommunications Act provides an independent basis upon which service providers that *do not* offer core services may participate in universal service support mechanisms. *See Recommended Decision* at ¶ 544 ("there is no reason to exclude carriers who do not provide core services, if they can offer eligible services to a school or library at the lowest rate.").

In many circumstances, schools, libraries and health care providers may prefer to take service from competitive bidders that do not propose to charge the lowest rate, but that better serve their telecommunications and advanced service needs. As such, these entities should be afforded the flexibility to make traditional consumer determinations, including a balancing of competing interests, *e.g.* quality issues, packages that include training or technical assistance, etc., to ensure that their needs are efficiently met. The Commission's universal service rules should not relegate these entities to inferior and ill-suited services simply because a preferred bidder submits a higher estimate for service in response to a requestor's request for proposal ("RFP").

In addition, the Commission must ensure that the competitive bidding process, as it applies to schools, libraries and health care providers, does not inhibit the participation of new entrants or wireless service providers in offering only enhanced services under Section 254(h) of the Telecommunications Act. The Joint Board's recommendations contain no competitive safeguards against the submission of bundled bids by companies that offer both core and advanced services. Under such circumstances, the providers of both types of services, *e.g.* the incumbent LECs, may seek to bundle their services in a single universal service package, without identifying its separate components. As a consequence, schools, libraries and health care providers may be constrained to choose the bundled package to satisfy both their core telecommunications and advanced services needs.

To prevent the leveraging of core services in competing for the opportunity to provide advanced services, and to prevent LECs and other entities from submitting "all-or-nothing" bids, the Commission should require that parties submitting bundled bids separately identify the costs

of the core telecommunications services and the advanced services in the bid submission. Expressly identifying the different costs of the services offered will enable schools, libraries and health care providers to make reasoned consumer choices and will permit wireless providers to compete for advanced services contracts. It also will ensure that the federal universal service rules are implemented in a competitively neutral manner, consistent with Congress' mandate.

VI. Conclusion

The Joint Board's recommendations constitute a significant step in making core telecommunications and advanced services available to all segments of society and within all regions of our country. Adoption of the modifications and clarifications of the Joint Board's recommendations identified herein will ensure that federal universal services rules promote competition, encourage consumer choice and are consistent with long-standing jurisdictional limitations imposed on both the Commission and the individual states.

Respectfully submitted,

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December 19, 1996

CERTIFICATE OF SERVICE

I, Mae L. Cephas, do hereby certify that on this 19th day of December, 1996, a copy of the foregoing "Comments" was sent via first-class mail, postage pre-paid, to the following:

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